Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

1978

NO._____

THEODORE THOMAS CURTIS, Petitioner

and

KEVIN ANDREW CURTIS, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF
CERTIORARI TO THE
UNITED STATES COURT
OF APPEALS FOR THE
NINTH CIRCUIT

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ATTORNEY FOR PETITIONERS

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioners, THEODORE THOMAS CURTIS and KEVIN ANDREW CURTIS, respectfully pray that a Writ of Certiorari issue to review judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceedings on October 12, 1977.

OPINION BELOW

The opinion of the Court of Appeals reported at 562 F.2d 1153 (9th Cir. 1977) appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on October 12, 1977. A timely Petition for Rehearing en banc was denied on March 10, 1978. The order of Modification of sentence was issued on April 3 , 1978.

It is strongly urged that this case be decided on the merits though not timely filed. In cases such as Heflin v. United States, 358 U.S. 415, and Taglianetti v. United States, 394 U.S. 316, n.1, where this Court noted that the time limitation "is not jurisdictional" and "does not bar our exercise of discretion to consider the case", the authority of this Court to waive the time limits has been made clear. In Arnold v. North Carolina, 376 U.S. 773, the petition was filed two weeks late and no extension had been sought nor had any extenuating circumstances been shown. However, this Court

granted the petition. Likewise, in Fuller v. Alaska, 393 U.S. 80, where the petition was filed a month after expiration of the time limits, this Court recognized the importance of resolving an issue of retroactivity and granted the petition in spite of its untimeliness.

This case raises the question of Fourth Amendment rights affected by the surreptitious implantation and use of electronic tracking devices in vehicles. In the instant case, there is a crucial need for review of this decision by the Ninth Circuit. In the Heflin, supra, case, an untimely petition was granted because the Court felt it necessary to resolve a split in the Circuits. Here, Also, the Circuits have reached opposite positions concerning the scope of the Fourth Amendment's protection. This is a crucial question which needs to be resolved promptly upon the merits because the use of secretly installed and judicially uncontrolled surveillance devices has become a widespread law enforcement practice. The validity of this practice has been upheld

in the Ninth Circuit and denied in the Fifth Circuit. This Court's guidance in the matter is an urgent necessity.

QUESTIONS PRESENTED

1. Whether the surreptitious installation and use of a transponder in the petitioners' aircraft without judicial approval or any subsequent judicial safeguards violated the petitioners' Fourth Amendment rights?

A. Whether the initial judicially unsupervised covert installation of the tracking surveillance device infringed upon petitioners' reasonable expectation of privacy, violating their Fourth Amendment rights?

B. Whether the judicially controlled continuous use of the tracking surveillance device constitutes an unreasonable invasion of petitioners' privacy violating their Fourth Amendment rights?

C. Whether consent to search may be given by the lessor of an aircraft when the lessee has finalized a lease agreement, has the paramount possessory interest in the airplane and is not involved in any joint enterprise with

the lessor?

D. Whether there was probable cause to implant the electronic surveillance device when the only facts known to the government agents were innocuous and susceptible of innocent construction?

2. Whether there was probable cause to search the vehicle of a co-defendant where there were few circumstances suggesting criminal activity and all were capable of reasonable innocent interpretation?

3. Whether there was sufficient evidence to sustain petitioners' conviction for possession of marijuana where there was no showing of actual or constructive possession as defined and demonstrated by previous court decisions?

STATEMENT OF THE CASE

Petitioner, Theodore Curtis, was an experienced pilot. He rented a Piper Navajo from ORCO Aviation and returned it on October 15, 1976. The general manager of ORCO suspected the plane had been used to transport marijuana.

When Mr. Curtis arranged to lease the plane again, the manager notified agents of the United States Customs Service of his suspicion. The general manager informed the agents that there were apparent discrepancies between the proposed itinary and fuel receipts, that seats in the airplane were removed and improperly reinstalled, and that the cabinet door was damaged. The manager later admitted that a change in the flight plan from a trip to New York to a trip to Las Vegas was probably communicated to him, thus accounting for the apparent fuel receipt discrepancy. Further, the manager also admitted that he had no knowledge of the condition the seats were in before the petitioner leased the plane. These seats were often removed and reinstalled by pilots flying patient transport for doctors.

On the basis of the above representations, on November 2, 1976, the Customs Agents obtained the permission of the manager to install the electronic tracking device, a transponder, in the aircraft. Despite the fact that a physical trespass was required and that there were absolutely no judicial guidelines to govern the procedure, a warrant was not obtained at any point.

On November 3, 1976, with the transponder in place, Theodore Curtis began a series of flights which were tracked by the transponder. On the evening of November 10, 1976, the plane was tracked in several flights, however, its signal was periodically lost. A Customs aircraft was dispatched to intercept the Piper Navajo, but it could not be located. Officers then went to an abandoned airstrip in the area. The Customs plane, equipped with an infrared surveillance device, arrived about 1:00 a.m., November 11, 1976. It detected a plane which could have been a Piper Navajo, although there was no way to confirm this for sure or to be certain that it was Mr. Curtis' plane. After the plane was

sighted, Customs Officers observed two land vehicles approach the parked plane. No activity between the aircraft and these vehicles was observed.

When the vehicles drove off, they were followed by the Customs aircraft. After the two separated, ground officials stopped the truck and camper, driven by Kevin Curtis. The officers searched the truck and seized approximately 400 pounds of marijuana.

Meanwhile, the aircraft belonging to Ted Curtis was traced to the Litchfield, Arizona, area. Customs Agents proceeded to Litchfield airfield and observed the Piper Navajo rented by Theodore Curtis. Agents approached the aircraft with weapons drawn and arrested the occupants. Theodore Curtis was arrested at this time.

On December 8, 1976, petitioners were indicted in the United States District Court, For the District of Arizona, for (1) Count I, conspiracy to violate 21 U.S.C. §295(a) and §960(a)(1), in violation of 21 U.S.C. 963; (2) Count II, importation, and aiding and

abetting in the importation of marijuana, in violation of 21 U.S.C. §952(a), and §960(a)(1) and U.S.C. §2; (3) Count III, possession with intent to distribute marijuana, in violation of 21 U.S.C. §841(a)(1) and (b), and 18 U.S.C. §2.

On January 24, 1977, petitioners brought motions for suppression of evidence and statements. The Honorable Russell E. Smith denied the motion to suppress the evidence seized from the vehicle driven by petitioner, Kevin Curtis; denied the motion to suppress evidence obtained by use of the transponder in the aircraft; granted the motion to suppress evidence seized from the aircraft; granted petitioners' motion to suppress incriminating statements; denied the motion to suppress co-defendant, John Dulin's, incriminating statements.

Following these rulings, the matter was submitted for trial to the Court on Count III of the indictment only on the basis of the record of the motions to suppress statements and a stipulation by counsel that the substance seized from the pickup truck and camper was 420 pounds of marijuana. On March 8, 1977, petitioners

were found guilty of Count III of the indictment.

On April 18, 1977, sentence was imposed and a timely appeal was filed. On October 12, 1977, an opinion affirming petitioners' conviction was filed. On November 14, 1977, a Petition for Rehearing en banc was filed. It was denied on March 10, 1978. The Court of Appeals relied upon United States v. Pretzinger, 542 F.2d 517 (9th Cir. 1976) for their decision concerning use of the transponder and its Fourh Amendment implications.

Petitioner, Theodore Curtis, sought a modification of his sentence on March 29, 1978. On April 3, 1978, an Order from the United States District Court of Arizona was issued modifying the petitioner's sentence so that he could serve a six-month term of incarceration in a half-way house type program instead of full institutional incarceration.

REASONS FOR GRANTING THE WRIT

1. This case brings squarely before the Court the question of Fourth Amendment rights affected by the surrepticious implantation and use of electronic tracking surveillance devices on motor vehicles generally and aircraft in particular. This decision by the Ninth Circuit Court of Appeals which is in direct conflict with that of the Fifth Circuit is domonstrative of the substantial practical need for authoritative guidance regarding this area from this Court. This guidance is especially crucial at a time when the sophistication of electronic surveillance devices threatens the most fundamental notions of privacy. Uniform Judicial Standards must be firmly established to protect individuals from the indiscriminate, continuous surveillance that scientific advances have made a reality.

A. The Ninth Circuit has held that government agents must obtain judicial approval in the form of a warrant, based on probable cause, if the planting of an electronic surveillance device entails intrusion into an area which is entitled to a reasonable expectation of

privacy under the Fourth Amendment. United States v. Pretzinger, 542 F.2d 517 (9th Cir. 1976); United States v. Hufford, 539 F.2d 32 (9th Cir. 1976). The placement of an electronic device in a protected area constitutes a "search". United States v. Pretzinger, supra. The crucial question in determining whether such a search has taken place is whether there was a reasonable expectation of privacy which was violated by the intrusion.

In United States v. Holmes, 521 F.2d 859 (5th Cir. 1975), the Court of Appeals dealt with this question in the context of a "beeper" (an electronic tracking device) affixed to the automobile in which certain suspects were riding. The Court recognized immediately that the installation of the tracking device was a search within the meaning of the Fourth Amendment. In doing so, it refuted the government's contention that the Appellants had no reasonable expectation of privacy when the automobile was parked in a public place or was moving about public highways. Relying on Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) the Fifth

Circuit stressed the fact that possible public accessability to the vehicle did not destroy the expectation of privacy:

> "When a person parks his car on a public way, he does not thereby give up all expectations of privacy in his vehicle. There is a right to be secure even in public."
> 521 F.2d at 864.

Katz, supra, is the most obvious example of this as a public telephone booth was involved.

The fact that the vehicle, while moving on the public highway, was easily observable likewise provided no justification for placing an electronic tracking device on the automobile. The Court felt that this was an intrusion beyond mere visual surveillance. It is a search at a time when an individual may reasonably expect to be alone in his car. The Court noted that few would argue that an individual by walking on a public street has given up his expectation of privacy so that secretly implanting a tracking device on his person would be unobjectionable from a privacy standpoint.

The Holmes Court then concluded by stating that the failure to obtain a warrant for installation of the tracking device was fatal to the search and the admissability of its fruits.

United States v. Hufford, 539 F.2d 32 (9th Cir. 1976) also dealing with the search of an automobile through use of a "beeper" reached the opposite conclusion. The Ninth Circuit Court of Appeals recognized that a search was involved, i.e., an "exploratory quest for evidence". However, the Court felt that there was no reasonable expectation of privacy. This belief was based upon the public nature of operating a vehicle on the public roads. Invoking Katz v. United States, supra, the Court noted that the driver of an automobile knowingly exposed his movements to the public and therefore was not entitled to Fourth Amendment protection.

The Court did realize, however, that a Fourth Amendment violation could occur while the "beeper" was being installed. When a second beeper was attached to a vehicle located in a

garage, drug agents obtained a warrant. Commenting on this procedure, the Court said:

> "Had the agents not resorted to a warrant, entrance into the garage and the opening of the truck's hood would have been an invasion of an area in which Hufford had a reasonable expectation of privacy."
>
> 539 F.2d at

Pretzinger, supra, apparently has extended the holding that motor vehicles are subject to "bugging" because of their use in public to include aircraft. Pretzinger, supra, was similar to the instant case in that a transponder was installed in an airplane which was suspected of transporting marijuana. The Court asserted its position that no reasonable expectation of privacy was violated, analogizing travel through airspace with an automobile traveling on the highway.

In the decision by the Ninth Circuit Court of Appeals in the instant case, United States v. Curtis, 562 F.2d 1153 (1977), the Court

was careful to point out the conflict in the Circuits, concerning the interpretation of the Fourth Amendment in the context of surrepticious electronic surveillance of vehicles:

> "The appellants vigorously complain that their Fourth Amendment guarantees were infringed by reason of the installation of the transponder and the introduction of evidence derived from its use. Their arguments bear considerable weight, having been adopted by the Fifth Circuit sitting en banc in United States v. Holmes, 537 F.2d 227 (5th Cir. 1976), affirming 521 F.2d 859 (5th Cir. 1975). Our Circuit, however, has adopted an approach contrary to that taken in Holmes. United States v. Pretzinger, 542 F.2d 519 (9th Cir. 1976), United States v. Hufford, 539 F.2d 32 (9th Cir. 1976) cert. denied 429 U.S. 1002, 97 S.Ct. 533, 50 L.Ed. 2d 614 (1976)." 562 F.2d at 1185.

The Honorable Judge Ely, in footnote 2, speaking for himself noted:

> "The author of this opinion joins his Brothers in resolving the questions relating to the transponder, but he does so only because he cannot logically distinguish Hufford and Pretzinger and thus believes that he had no choice save to abide by the decisions in those cases. If free to do otherwise, he would follow United States v. Holmes . . ." 562 F.2d at 1156.

It is apparent that the conflict in the Holmes decision with the Pretzinger, Hufford cases, line of cases places an extreme hardship on the judiciary and on the individuals whose Fourth Amendment rights are severely curtailed in the Ninth Circuit. Encroachment by sophisticated surveillance devices should be recognized as a threat to the privacy of the individual beyond anything imaginable in the last decade. Ours is an age in which the entire culture has been integrated with the necessity of transporting

one's self on public thoroughfares. It is more imperative than ever to protect the privacy that remains. The fact that our technological, transportation-orientated society has forced citizens to expose themselves to public view should not be used as a justification for further invading their remaining privacy.

B. The decision below also raises reoccurring questions as to the standards to be used and guidelines to be imposed for continuous use of surveillance devices. As the Ninth Circuit Court of Appeals noted in its opinion, law enforcement agencies should not have carte blanche power to conduct continuous surveillance of varying numbers of people. However, by upholding the placement of a monitoring device with no requirement of judicial safeguards, the Court has encouraged this type of conduct. Theoretically, surveillance could continue unchecked and unsupervised for months or years into the future. This type of surveillance could monitor an individual's every movement regardless of the continued existence or non-existence of the original cause for implanting the device.

Use of the "beeper" is a method of electronic surveillance much like the surveillance accomplished by wire taps. In that area, Congress was so concerned with surveillance that it regulated the use of wire taps in compliance with Katz, supra, 18 U.S.C. 2510, et seq. The instant case provides this Court with an opportunity to institute the guidelines necessary to prevent abuses of the Fourth Amendment inherent in unsupervised electronic surveillance of an individual's movement.

C. A related question in this area is one of consent. The lower Court ruled that the lessor of the aircraft had the authority to consent to the implantation of the tracking device even though the Appellant had finalized the lease agreement (562 F.2d at 1155, footnote 1). Appellant strongly asserts that this view is in direct conflict with the law in other analogous situations. This conflict should be clarified and resolved by this Court.

As the lessee of the aircraft, Mr. Curtis had an existing possessory interest in it. The manager of the airfield recognized this and

admitted that at the time of the implantation, the aircraft was "basically his plane and it was waiting for him to come and pick it up and fly off". (Reporter's Transcript, Volume I). This situation is clearly analogous to the landlord-tenant situation.

In Chapman v. United States, 365 U.S. 610 (1961), the owner of a house, suspecting that his tenant was engaged in illegal activity, consented to the police entering and searching the house. This Court held that the search was unconstitutional as a landlord has no right to consent to the search of the tenant's room. Stress was placed on the fact that Fourth Amendment rights should not hinge on property law distinctions.

This view was further reinforced by Stoner v. California, 376 U.S. 483 (1964), which extended the protection to a hotel room. The Court rejected the argument that ownership coupled with access for limited purposes during rental periods constituted authority to consent to a search. Stoner v. California, 376 U.S. at 489.

This is not a situation where there was a joint venture with the air service manager. Therefore, third party consent is invalid. By virtue of the lease agreement, Mr. Curtis had the sole possessory interest and he did not intend the manager to be a partner in it. The United States v. Matlock, 415 U.S. 164 (1974), and United States v. White, 401 U.S. 745 (1971), line of cases are inapplicable in this situation because the lessee was not sharing co-equal access to the plane. On the contrary, he had reserved it for himself only. The decision of the lower Court is in conflict with the applicable decisions of this Court concerning consent and therefore review is fully warranted.

D. The Appellant also asserts that there was no probable cause by which the implantation of the transponder could be justified. The lower Court's decision that there was probable cause stands in contrast to other decisions making a finding of probable cause.

A review of the information given to the government agents clearly indicates that a finding of probable cause was unwarranted.

According to the government agent, the reliable information which was given by the airport manager was (1) that discrepancies appeared to exist between the announced itinerary and fuel receipts; (2) the seats had been removed and reinstalled improperly; and (3) a cabinet door was damaged. The manager's belief that the propellers of the aircraft indicated use on an unimproved landing strip and that he observed a vegetable debris which might be marijuana seeds, was not conveyed to the government agents before they installed the transponder (Reporter's Transcript Volume I, 18, 80, 92-93). Each of these factors has been shown to be innocuous rather than suspicious. Mr. Curtis originally planned a trip to New York. However, the air service manager admits he was possibly told of Appellant's change in plans--a trip to Las Vegas. All fuel receipts reflect this trip to Las Vegas.

The manager was also not sure whether the seats of the airplane were properly installed when the Appellant rented the plane. The aircraft had been used by doctors transporting their patients and the seats were often removed and

reinstalled by the pilot.

The manager saw what he believed to be marijuana seeds in the plane. He described them as similar to popcorn seeds. Marijuana seeds are dissimilar to popcorn and no chemical test was performed on the seeds. In fact, this information was not given to the law enforcement agents until implanting the device had begun. At that time, the agent also observed a vegetable type of debris in the plane. He was not able to identify it as marijuana despite his extensive experience with drug-related offenses. Again, no chemical analysis was conducted. Also, a check of the Appellant's background revealed that he had no prior criminal record or activities.

Appellant feels that the case clearly shows there was not enough reliable information to constitute probable cause. Probable cause cannot be established by reliance on circumstances which are susceptible of a variety of credible interpretations not necessarily indicative of criminal conduct. United States v. Kandlis, 432 F.2d 132 (9th Cir. 1972). This Court should review the determination of the

lower Court that probable cause existed and reaffirm the holding of United States v. Kandlis, supra.

2. The lower Court also held that there was probable cause to search the pickup truck driven by Kevin Curtis. Petitioner, Theodore Curtis, has standing to attack the search as he was convicted of a possessory offense based on the contraband seized from Petitioner, Kevin Curtis. The decision of the lower court is in need of review as it is in conflict with the various decisions determining the presence of probable cause.

In order to justify this search, probable cause that the truck contained contraband must be established, Coolidge v. New Hampshire, 403 U.S. 443 (1971). This search cannot be justified as a search incident to arrest, as the co-defendant was lying on the ground, handcuffed, at gun point, some distance from the vehicle, Chimel v. California, 394 U.S. 752 (1969). Nor was it authorized by the driver's consent.

In examining the information available to law enforcement officials at the time, an

absence of probable cause is obvious. The agents lost the signal on Ted Curtis' plane on more than one occasion while attempting to track him, therefore, they could not be certain that the truck was actually near the Curtis airplane. Even if this information was available, there was no sign of the aircraft flying into Mexico. On the ground, there was no sign of suspicious activity such as loading or unloading. As noted before, the activities of Ted Curtis himself were innocuous rather than suspicious.

As the Court noted in United States v. Kandlis, supra, probable cause cannot be generated by circumstances, reliance upon which are "susceptible to a variety of credible interpretations not necessarily compatible with nefarious activity". See, also, United States v. Majourau, 474 F.2d 766 (9th Cir. 1973).

The instant case is clearly distinguishable from cases such as Pretzinger, supra, where marijuana seeds were positively identified in the interior of the plant; the plane was traced to Mexico; and bags were observed in the car that had met the plane. Likewise, in United States v.

Coplen, 541 F.2d 211 (9th Cir. 1976), it was established by visual observation that marijuana debris was in the aircraft which had been positively tracked into Mexico.

This Court should review the finding that probable cause to search the truck existed, in light of the paucity of circumstances indicating probable cause.

3. In this Appeal, petitioners contend as they did at the lower Court level, that there was insufficient evidence to convict them of possession of marijuana with the intent to distribute, 21 U.S.C. §841(a)(1). The conviction based on the evidence presented conflicts sharply with preceding decisions regarding sufficiency of evidence, in general, and the element of possession, in particular. Therefore, the authority of this Court is necessary to clarify and reaffirm the law in these areas.

As the preceding reviews of the evidence have shown, there was no way the government agents could be certain that they were constantly on the track of Theodore Curtis' plane. Assuming that it was his plane which made contact with the

pickup truck, there was no evidence that marijuana was loaded from the airplane to the truck or moved in any way. This is noteworthy considering the advanced surveillance in use--a forward look infrared device which can detect a human being on the ground from a height of 8,000 feet. The aircraft never crossed the border. No evidence of any marijuana residue, or anything else, was admitted into evidence from the plane.

In order to convict petitioners of the offense, possession must be proved. There is absolutely no evidence that petitioner, Theodore Curtis, was in actual possession of the marijuana which was seized from the camper. Therefore, if the conviction is sustainable, proof of constructive possession must be established. To prove constructive possession, the government must prove beyond a reasonable doubt that the accused knows of the presence of the drug and has the power to exercise dominion and control over it, Williams v. United States, 418 F.2d 159, 162 (9th Cir. 1969). Mere presence at the location of a controlled substance is not sufficient to prove possession. See, e.g., United States v.

Pruett, 551 F.2d 1365 (5th Cir. 1977); United States v. Castillo, 524 F.2d 286 (5th Cir. 1975); United States v. DiNovo, 523 F.2d 197 (7th Cir. 1975) cert. denied 423 U.S. 1016 (1975); Araujo-Lopez v. United States, 405 F.2d 466 (9th Cir. 1969). Likewise, proof of participation in a narcotics venture is not sufficient to support a conviction for possession in the absence of proof of dominion and control. United States v. Jackson, 526 F.2d 1236 (5th Cir. 1976). Presence in the area of contraband with awareness of its location is also insufficient to support a conviction for possession, if dominion and control is not proved. United States v. Maspero, 496 F.2d 1354 (5th Cir. 1974). In cases similar to this one, the evidence has been held insufficient to sustain a conviction. See United States v. Stroupe, 538 F.2d 1063 (4th Cir. 1976); United States v. Epperson, 485 F.2d 514 (9th Cir. 1973); United States v. Frol, 518 F.2d 1134 (8th Cir. 1975); United States v. Pretzinger, supra, 542 F.2d 517.

It is axiomatic that the prosecution must prove every element of the offense charged

beyond a reasonable doubt. In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). In order to support a conviction, inferences of guilt must be drawn from facts from which an innocent inference cannot reasonably be drawn. Mullaney v. Wilbur, 421 U.S. 684, 702 n.31, 95 S.Ct. 1881, 44 L.Ed.2d 408 (1975). In the instant case, considering the scanty evidence, the existence of alternative, reasonable inferences is obvious. Even assuming that petitioner's aircraft was the plane observed near the truck, it could have been summoned there on a pretext, and when the occupants were requested to transport the marijuana, they refused to comply.

In the instant case, the Court is urged to review the sufficiency of the evidence for a conviction of a possession offense. Petitioners submit that it is of crucial importance for this Court to re-establish the standards for proof of possession.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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Attorney for Petitioners

CERTIFICATE OF SERVICE

STATE OF ARIZONA)
) ss.
County of Pima)

I, ROBERT J. HOOKER, hereby certify that pursuant to Rule 33(3), Rules of Procedure for the United States Supreme Court, three (3) copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit were mailed to the Office of the Solicitor General, Room 5614, Department of Justice, Washington, D.C., on this the 18th day of July, 1978.

ROBERT J. HOOKER

SUBSCRIBED AND SWORN to before me, this 18th day of July, 1978, by ROBERT J. HOOKER.

NOTARY PUBLIC

My commission expires:

June 28, 1979

A P P E N D I X

UNITED STATES of America,

Appellee,

v.

Theodore Thomas CURTIS, Appellant.

UNITED STATES of America,

Appellee,

v.

Dale Peter CORDOVA, Appellant.

UNITED STATES of America,

Appellee,

v.

Kevin Andrew CURTIS, Appellant.

UNITED STATES of America,

Appellee,

v.

John Phillip Dulin, Appellant.

Nos. 77-2070/71, 77-2107 and
77-2235

United States Court of Appeals,
Ninth Circuit.

Oct. 12, 1977.

Defendants were convicted in the United States District Court for the District of Arizona, Russell E. Smith, Chief Judge, and C. A. Muecke, J., of possessing a quantity of marijuana with intent to distribute. Defendants appealed. The Court of Appeals, Ely, Circuit Judge, held that where officers had been given reliable information, based on articulable facts, that an airplane was being utlized in pursuit of criminal activity by a specific, identifiable individual, who had made arrangements to rent the plane, it was proper for the owner to arrange for installation, bu customs officials, of a transponder, an electric tracking device, although, in the ordinary case, secret surveillance devices in vehicles should be installed pursuant to court order under such reasonable time limitations and other restrictions as the court should, in the circumstances, reasonably impose.

Affirmed.

1. Criminal Law -- 520(2)
Simple representation to defendant, who was cooperative confessor, that fact of his cooperation would be made known to prosecuting authorities was insufficient to render his confession involuntary.

2. Aviation -- 245
Owner of airplane had right, before time for commencement of period of rental of the airplane to defendants, to install, through owner's agent, any instrument that would not be physically dangerous to occupants of the plane.

3. Customs Duties -- 126
Where officers had been given reliable information, based on articulable facts, that airplane was being utilized in

pursuit of criminal activity by specific, identifiable individual, who had made arrangements to rent the plane, it was proper for owner to arrange for installation, by customs officials, of transponder, an electric tracking device, although, in ordinary case, secret surveillance devices in vehicles should be installed pursuant to court order under such reasonable time limiataions and other restrictions as court should, in the circumstances, reasonably impose. U.S.C.A. Const. Amend. 4.

4. Searches and Seizures -- 3.3(7)
There was adequate probable cause for search of camper truck which approached parked airplane which had been under proper surveillance and remained by airplane for period of five or ten minutes, and for seizure of contraband being transported by the driver. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), 21 U.S.C.A. § 841(a)(1); U.S.C.A. Const. Amend. 4. 2309

Appeal from the United States District Court for the District of Arizona.

Before ELY and CARTER, Circuit Judges, and ENRIGHT, District Judge.*

ELY, Circuit Judge:

The four appellants were charged and convicted of having possessed a quantity of marijuana with the intent to distribute the same, a violation of 21 U.S.C. § 841(a)(1). Other charges in the original indictment, conspiracy to import

*Honorable William B. Enright, United States District Judge, Southern District of California, sitting by designation.

marijuana and unlawful importation of marijuana, had been dismissed, pursuant to stipulation, prior to the nonjury trial. The appellants present four principal contentions:

(1) That the installation of a so-called transponder in a Piper Navajo aircraft, and the introduction of evidnece derived from the use of the transponder, constituted an infringement of the appellants' Fourth Amendment rights.

(2)That arresting officers did not have probable cause to stop and search a vehicle being driven by the appellant Kevin Curtis.

(3) That a confession made by the appellant Dulin was involuntary.

(4) That the prosecution's evidence was insufficient to support the convictions of the appellants Thomas Curtis, Cordova, and Dulin.

We pass an extended discussion in respect to the claim of inadequate evidence. If Dulin's confession was voluntary, there obviously was sufficient evidence to convict him. And if the evidence derived from the transponder and the marijuana revealed by the search were properly received, the evidence, considered as a whole and viewed in the light most favorable to the Government, was adequate to support the confictions of Cordova and Theodore Curtis.

[1] As to appellants' argument in respect to Dulin's confession, the argument has no merit. The trial judge made the determination that Dulin's confession was voluntary, and that finding must be upheld unless it can be said that the finding is clearly erroneous. United States v. Cluchette, 465 F.2d 749, 754 (9th Cir. 1972). The investigating officers twice gave Dulin the required warning

before Dulin made his admissions. Dulin argues that he was in fact promised, or thought he was promised, leniency in return for the admission. The record belies this contention. Dulin was not offered leniency. He was told only that it would be made known to responsible authorities that he had cooperated. Furthermore, Dulin admitted that he realized at the time he made his admissions that no promise was being made to him. A simple representation to a coopearating confessor that the fact of his cooperation will be made known to prosecuting authorities is insufficient to render a confession involuntary. United States v. Glasgow, 451 F.2d 557, 558 (9th Cir. 1971). The court's finding that Dulin's confession was voluntary is fully supported.

2310

While it is probably unnecessary, we briefly review the circumstances surrounding the installation of the transponder. The appellant Theodore Curtis (hereinafter Theodore) was an experienced aviator. ORCO Aviation, whose general manager at Riverside, California was one Joe Pagan, owned a Piper Navajo airplane. Theodore had rented the plane from October 4th to October 15th, 1976. When the aircraft was returned on the 15th of October, Pagan suspected that the plane had been used to transport marijuana. His suspicion was based on the following: (1) There were apparent discrepancies between the supposed itinerary of the aircraft and the receipts for the fuel that had been consumed; (2) some of the seats in the plane had been removed and improperly replaced; (3) one of the cabinet doors of the aircraft had been damaged; (4) there was vegetable debris in the plane that Pagan thought was marijuana; (5) the aircraft's propellers bore evidence that the

plane had been landed on at least an unimproved airstrip. On October 26, 1976 Theodore arranged with Pagan to rent the aircraft again. The period of rental was to be ten days, beginning on November 3, 1976, and Theodore deposited $300 to secure the arrangement. On November 1st, two days before this rental period was to commence, Pagan informed agents of the United States Customs Service of his suspicions. At the same time, he arranged for the installation by Customs officials of the transponder, an electronic tracking device, in the aircraft. The installation was made on the following day, November 2d, without prior judicial approval, while the plane still remained in the possession and control of Pagan, who, as has been noted, was the agent and general manager of the aircraft's owner. After Theodore took possession of the plane on November 3d, and during the period from that date to November 10th, various trackings of the aircraft's flights were made and recorded with the use of the transponder. The plane was tracked to the Litchfield Airport in Litchfield, Arizona, some ten to fifteen miles outside the City of Phoenix, where Theodore and Cordova was observed with the plane. The ship was also tracked to Phoenix, and in the early hours of November loth, the transponder's signals indicated that the plane was headed in the direction of the Mexican border. The signals from the transponder were lost when the plane was approximately forty miles north of the border, but at 2:40 a.m. on November 10th, at 9:20 p.m., signals reappeared as the plane proceeded toward the Mexican border. The signals were lost at the same place as before, but at 12:45 a.m. on November 11th, the signals reappeared and disclosed that the

aircraft was heading northerly, away from Mexico. The signals were tracked to the vicinity of Wenden, Arizona, and then lost. A Customs aircraft was dispatched for the purpose of intercepting the Piper Navajo, but the officials were unable to locate the Piper. The officers then proceeded in their aircraft to an abandoned airstrip about thirty miles from Wenden. The Customs plane was equipped with an infrared surveillance device, and at approximately 1 a.m., the Customs agents, with the use of this device, detected an airplane with the configuration of a Piper Navajo. The detected plane was parked on an abandoned airstrip. After this plane had been sighted, the Customs officers observed two land vehicles of normal size approach the parked airplane and remain for a period of five or ten minutes. The 2311 officers observed that neither the parked aircraft nor the land vehicles on the abandoned strip displayed any lights, and when the plane under observation took to the air at about 1:10 a.m., it did not utilize its running lights. The Customs officers, in their plane, briefly pursued the departing plane and then returned to observe the ground vehicles. These two vehicles remained parked for a moment and then proceeded toward an interstate highway. They traveled about one mile to the on-ramp of the highway before their headlights were turned on. The Customs airplane followed both of the vehicles until the latter separated, at which time the plane followed what the operators were then able to identify visually as a truck with a camper shell. he airborne agents contacted ground facilities and arranged that this truck be intercepted. Other agents, observed by officers in the Customs aircraft, intercepted the truck, which was being operated

by Kevin Curtis (hereinafter Kevin). Kevin was taken into custody. The officers searched the truck and found therein approximately 400 pounds of marijuana. The contraband was seized, and, over objection, eventually received as prosecution evidence.

[2,3] The appellants vigorously complain that their Fourth Amendment guarantees were infringed by reason of the installation of the transponder and the introduction of evidence derived from its use. Their arguments bear considerable weight, having been adopted by the Fifth Circuit sitting en banc in United States v. Holmes, 537 F.2d 227 (5th Cir. 1976), affirming 521 F.2d 859 (5th Cir. 1975). Our Circuit, however, has adopted an approach contrary to that taken in Holmes. United States v. Pretzinger, 542 F.2d 517 (9th Cir. 1976); United States v. Hufford, 539 F.2d 32 (9th Cir. cert. denied, 429 U.S. 1002, 97 S.Ct. 533, 50 L. Ed. 2d 614 (1976). Pretzinger, as does the case at hand, involved the installation of a transponder in an airplane suspected of being used for the smuggling of marijuana and the tracking of the plane to its rendezvous with two trucks. The facts in Pretzinger cannot logically be distinguised from those before us now, and the legal conclusions reached in Pretzinger, as well as in Hufford, are controlling precedents that compel the rejection of the appellants' Fourth Amendment claims in respect to the installation and use of the tracking device.[1]

1. The appellants have argued that Pagan had no authority to grant to the officers permission to install the transponder. They base this argument upon the fact that the agreement for the rental of the plane had been made prior to the transponder's installation. We reject the argument. The installation occurred before the time for the commencement of the rental period. The owner

of the plane had full control and dominion over it at the time, and it seems logical to us that the owner, through its agent, had the right at the time to install within its airplane any instrument that would not be physically dangerous to occupants of the plane.

The three judges here concerned wish to make it clear that in this age of ever-advancing sophistication in the development of electronic eavesdropping devices, they are not insensitive to unjustifiable intrusions on the right of privacy, a right that is deemed to be most precious to the American people. Law enforcement agencies should not have carte blanche power to conduct indiscriminate surveillance for unlimited periods of time of varying numbers of individuals. Our conclusion as to the propriety of the installation and use 2312 of the transponder in this case is predicated upon the peculiar facts and circumstances as a whole, particularly that here the officers, prior to the installation, had been given reliable information, based on articulable facts, that the plane was being utilized in the pursuit of criminal activity by a specific, identifable individual. Absent these considerations, and in the ordinary case, we are inclined to the view that secret surveillance devices in vehicles should be installed pursuant to court order, as in Hufford, under such reasonable time limitations as the court should, in the circumstances, reasonably impose.[2]

2. The author of this opinion joins his Brothers in resolving the questions relating to the transponder, but he does so only because he cannot logically distinguish Hufford and Pretzinger and thus believes that he had no choice save to abide by the decisions in those cases. If free to do otherwise, he would follow United States v. Holmes, 521 F.2d 859

(9th Cir. 1975), aff'd en banc, 537 F.2d 227 (9th Cir. 1976). See also, United States v. Bobisink, 415 F.Supp. 1334 (D.Mass.1976). Writing in this footnote for himself only, he expresses his opinion that the reasoning of Holmes is more logical and precise than that set forth by our court in Hufford and Pretzinger.

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[4] Finally, we hold that there was adequate probable cause for the search of the camper truck being operated by Kevin and the seizure of the contraband that he was then transporting. See, United States v. Coplen, 541 F.2d 211, 215 (9th Cir. 1976), cert. denied, 429 U.S. 1073, 97 S.Ct. 810, 50 L.Ed.2d 791 (1977), and United States v. Young, 535 F.2d 484, 487-88 (9th Cir.), cert. denied, 429 U.S. 999, 97 S.Ct. 525, 50 L.Ed.2d 609 (1976). Cf., United States v. Patterson, 492 F.2d 995, 997 (9th Cir.), cert. denied, 419 U.S. 846, 95 S.Ct. 82, 42 L.Ed.2d 75 (1974).

The judgments of conviction are AFFIRMED.

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

No. 78-121

In the Supreme Court of the United States

OCTOBER TERM, 1978

THEODORE THOMAS CURTIS AND
KEVIN ANDREW CURTIS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-10) is reported at 562 F. 2d 1153. The opinion of the district court is unreported.[1]

JURISDICTION

The judgment of the court of appeals was entered on October 12, 1977. A petition for rehearing was denied on March 10, 1978. The petition for a writ of certiorari was

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[1]The district court's opinion, which was not filed with the petition, is attached hereto as an Appendix.

filed on July 5, 1978, and is therefore substantially out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the installation and use of an electronic tracking device on a rental aircraft with the express consent of the airplane's owner, before petitioners took control of it, violated petitioners' Fourth Amendment rights.

2. Whether federal officers had probable cause to search the truck in which marijuana was found.

3. Whether the evidence was sufficient to support the conviction of petitioner Theodore Curtis.

STATEMENT

Following a non-jury trial in the United States District Court for the District of Arizona, petitioners were convicted of possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Both were fined $1500 and sentenced to six months' imprisonment, to be followed by four years' probation and two years' special parole. The court of appeals affirmed (Pet. App. A-1 to A-10).

The evidence at trial[2] showed that in October 1976 petitioner Theodore (Ted) Curtis rented a Piper Navajo aircraft from Riverside Air Service in Riverside, California (I Tr. 11-12). After Curtis returned the airplane on October 15, Joe Pagan, one of the owners of the air service, suspected that it may have been used for

[2]The parties stipulated that the facts adduced at the suppression hearing would also constitute the trial record (II Tr. 232).

transporting marijuana. Pagan saw what he believed might be marijuana debris inside the aircraft. He also noticed that one of the seats appeared to have been removed and improperly reinstalled and that a door had been damaged (I Tr. 18-22). Marks on the propellers indicated that the airplane had been used on dirt or gravel airstrips (I Tr. 18). Although the invoice for the rental of the plane showed that it would be based in Las Vegas, Curtis had told Pagan that he wanted to use the plane for a trip east (I Tr. 33-34). Pagan also noticed from the gas receipts submitted by Curtis that the plane had been refueled more than should normally have been required, considering the range of the aircraft and the destinations indicated (I Tr. 53-54).

On October 26, Ted Curtis arranged to rent the Piper Navajo again, beginning on November 3, 1976 (I Tr. 38). On November 1, Pagan contacted Customs officials, conveyed his suspicions about Curtis, and requested that a "beeper"[3] be installed on the aircraft in order to monitor its movements (I Tr. 26-27). The beeper was installed on November 2, with the written permission of Pagan, and Ted Curtis took possession of the plane on November 3 (I Tr. 27-29).

Between November 3 and November 10, federal agents tracked the aircraft with the aid of the beeper. In the early hours of November 10, signals from the transponder indicated that the airplane was traveling south toward the Mexican border (II Tr. 88). The signal was lost when the plane was near Dateland, Arizona, approximately 40 miles north of the border. At 2:40 a.m., however, the

[3]A "beeper" is an electronic tracking device, also commonly called a transponder, which, when activated, transmits a signal indicating the approximate location of the person, object, or vehicle to which it is attached.

signal was received once again, and the plane was tracked flying north from the same area (II Tr. 88, 57). The signal was lost when the plane was about 30 miles south of Wenden, Arizona (II Tr. 57). The next evening the aircraft was tracked making a similar flight, and the signal was again lost in the vicinity of Wenden, Arizona at about 1:00 a.m. on November 11 (II Tr. 89, 60-61). A Customs Bureau aircraft that had been attempting to intercept the Navajo then proceeded to an abandoned airstrip near Wenden where, with the aid of an infrared surveillance device, Customs agents detected an airplane with the configuration of a Piper Navajo parked on the unused airstrip (I Tr. 103-104; II Tr. 3-5). The officials observed two land vehicles approach the aircraft and remain there for five to ten minutes (I Tr. 104-106). At about 1:10 a.m. the airplane took off again and the ground vehicles drove away (I Tr. 106). Neither the parked aircraft nor the land vehicles displayed any lights, and the aircraft took off without the use of its running lights (I Tr. 106; II Tr. 5, 9). The airborne Customs agents followed the two ground vehicles as they traveled about one mile to an interstate highway, where the headlights were turned on for the first time. The first vehicle, which the agents could then identify as a camper truck, started west on the highway, then made a U-turn and proceeded in an easterly direction (I Tr. 109; II Tr. 8-9). The agents signalled other agents on the ground to stop the camper, and the driver, petitioner Kevin Curtis, was arrested. A search of the truck revealed some 400 pounds of marijuana (II Tr. 35-37, 231). The Navajo was again tracked flying towards Phoenix, and when it landed at Litchfield, just west of Phoenix, Customs agents arrested petitioner Ted Curtis, the pilot, and two other occupants of the aircraft (II Tr. 62-64).

ARGUMENT

1. Petitioners contend (Pet. 11-24) that the installation and use of the beeper on the rented aircraft violated their Fourth Amendment rights.

The courts of appeals have distinguished between the interests affected by the initial attachment of a beeper and its subsequent use. Where the beeper has been installed with the consent of the owner of a vehicle, the installation has uniformly been upheld against Fourth Amendment challenges by persons who subsequently leased the vehicle from the consenting owner. See *United States* v. *Miroyan*, 577 F. 2d 489 (C.A. 9), certiorari pending, Nos. 78-5141 and 78-5171; *United States* v. *Cheshire*, 569 F. 2d 887 (C.A. 5), certiorari denied, No. 77-6586, June 19, 1978; *United States* v. *Abel*, 548 F. 2d 591 (C.A. 5), certiorari denied, 431 U.S. 956; *Houlihan* v. *State*, 551 S.W. 2d 719 (Tex. Crim. App.), certiorari denied, 434 U.S. 955. See *Miroyan* v. *United States*, Nos. A-99 and A-87, decided August 8, 1977 (Rehnquist, Circuit Justice).

The courts have adopted divergent views on whether the subsequent use of a lawfully installed beeper to monitor the location of a vehicle implicates Fourth Amendment privacy interests. Compare *United States* v. *Hufford*, 539 F. 2d 32, 34 (C.A. 9), certiorari denied, 429 U.S. 1002 (no privacy interest implicated), with *United States* v. *Moore*, 562 F. 2d 106, 111 (C.A. 1), and *United States* v. *Frazier*, 538 F. 2d 1322 (C.A. 8), certiorari denied, 429 U.S. 1046 (limited privacy interest implicated).[4] Yet even those courts that have concluded

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[4] *United States* v. *Holmes*, 537 F. 2d 227 (C.A. 5) (*en banc*), heavily relied upon by petitioners, was an affirmance by an evenly divided court of appeals of a district court ruling in the defendants' favor. The use of beepers in circumstances similar to those presented here

that use of a beeper touches some protected Fourth Amendment interests have recognized that the method is substantially less intrusive than other forms of search or surveillance. See *United States* v. *Moore, supra; United States* v. *Frazier, supra;* cf. *Cardwell* v. *Lewis,* 417 U.S. 583, 590. A beeper does not monitor private conversations or serve any function other than assisting in locating a vehicle, and it is therefore scarcely more intrusive than other aids to visual surveillance, such as radar. Moreover, whatever legitimate expectation of privacy an individual may ordinarily have in his location on the public roads or airways (and we believe it is little or none) is considerably diminished by his use of a rented vehicle, since he must bear the risk "that the owners of the plane might consent to such investigative activity" (*United States* v. *Cheshire, supra,* 569 F. 2d at 889 n. 3). In those circumstances, even if the use of a beeper constitutes a "search" for Fourth Amendment purposes, it is reasonable when the officers obtain the consent of the owners of the vehicle to such use, especially when, as here, the officers had a well-founded suspicion that criminal activity was afoot. That conclusion is consistent with all other decisions involving similar circumstances (*United States* v. *Miroyan, supra; United States* v. *Cheshire, supra; United States* v. *Abel, supra*) and does not warrant this Court's review.

The fact that the beeper was installed after petitioner Ted Curtis contracted to lease the airplane but before he actually took possession of it does not distinguish this

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has been approved by the Fifth Circuit (*United States* v. *Cheshire, supra; United States* v. *Abel, supra; United States* v. *Perez,* 526 F. 2d 859, certiorari denied, 429 U.S. 846), and that court has pointed out that the question whether the use of a beeper constitutes a search is still an open question in the Fifth Circuit. *United States* v. *Cheshire, supra,* 569 F. 2d at 888.

case from cases such as *Cheshire,* where the beeper was placed on the airplane before the rental agreement was made. Curtis had arranged to rent the airplane beginning on November 3, and the beeper was placed on it on November 2, one day before petitioner took possession of it and the rental period began. As the court of appeals explained (Pet. App. A-8 to A-9 n. 1), the owner of an aircraft has full dominion and control over it prior to the commencement of a rental period and therefore has the right to install any instrument that would not be dangerous to the occupants of the plane. See also *United States* v. *Miroyan, supra,* 577 F. 2d at 493; *United States* v. *Abel, supra,* 548 F. 2d at 592; cf. *United States* v. *Hufford, supra,* 539 F. 2d at 34. This case therefore bears no resemblance to *Stoner* v. *California,* 376 U.S. 483, and *Chapman* v. *United States,* 365 U.S. 610, where the owner of a house and a hotel consented to searches of rented rooms after the tenants had taken possession and placed their personal belongings in the rooms.

2. Petitioners also contend (Pet. 5, 24-26) that the officers lacked probable cause to search the camper truck driven by Kevin Curtis because the circumstances surrounding the late-night rendezvous on the deserted airstrip were capable of an innocent interpretation. It is well-established, however, that a probable cause determination does not require law enforcement officers to view the facts in the light most favorable to suspects and to credit any possible innocent explanation for their behavior. *United States* v. *Lewis,* 556 F. 2d 385 (C.A. 6). Instead, a probable cause determination is "an act of judgment formed in the light of the particular situation and with account taken of all the circumstances." *Brinegar* v. *United States,* 338 U.S. 160, 176. And that judgment is guided by "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Id.* at 175.

There were so many suspicious circumstances in this case that an innocent explanation for petitioners' activities is highly implausible. The previous discovery of what appeared to be marijuana debris by Pagan, the flight patterns to and from the border area, the hour of the night that the flight took place, the activity observed on the unlighted, deserted airstrip, and the vehicles' surreptitious driving patterns made it appear likely that a smuggling operation was taking place and that contraband had been loaded into one of the vehicles. See *United States* v. *Coplen*, 541 F. 2d 211, 215 (C.A. 9), certiorari denied, 429 U.S. 1073; *United States* v. *Young*, 535 F. 2d 484, 487-488 (C.A. 9), certiorari denied, 429 U.S. 999. The search of the camper truck was thus entirely lawful. *Chambers* v. *Maroney*, 399 U.S. 42; *Carroll* v. *United States*, 267 U.S. 132.

3. Finally, petitioner Theodore Curtis contends (Pet. 26-29) that the evidence was insufficient to support his conviction for possession of marijuana because there was no proof that it was his airplane that made contact with the truck, or that the marijuana was actually transferred from the airplane to the truck.

Viewing the evidence in the light most favorable to the government, there was ample evidence from which the trier of fact could infer that Theodore Curtis had transported the marijuana in the airplane he was piloting and had transferred it to the camper truck. The Customs agents had testified that they were not aware of any other beeper installations in that area and on that date except the one in the Piper Navajo rented by Curtis (II Tr. 57, 97). Curtis's plane was tracked to the immediate vicinity of the deserted military airstrip, where Customs agents observed an airplane and two trucks, one of which was shortly afterwards found to be transporting marijuana. The signal from the Piper Navajo was again picked up,

indicating that the aircraft was heading east towards Phoenix, and Curtis was arrested after landing at Litchfield, just west of Phoenix. Although the actual transfer of marijuana from the airplane to the truck was not observed in the darkness, the circumstantial evidence is sufficient to prove possession by Ted Curtis. *United States* v. *Evers*, 552 F. 2d 1119, 1121 (C.A. 5), certiorari denied, 434 U.S. 926. As the district court concluded from its review of all the evidence, "[t]he inference is inescapable that there was marijuana aboard the Navajo which was loaded and found in the pickup truck" (App., *infra*, p. 6a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1978.

DOJ-1978-09

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CR 76-470-PHX

UNITED STATES OF AMERICA,
Plaintiff,

v.

THEODORE THOMAS CURTIS, DALE PETER CORDOVA,
JOHN PHILLIP DULIN, and KEVIN ANDREW CURTIS,
Defendants.

FINDINGS OF FACT

As to defendants Theodore Curtis and Dale Cordova, I find:

The defendants were charged in three counts with conspiracy to import marijuana (21 U.S.C. § 963), the importation of marijuana (21 U.S.C. §§ 952(a) and 960(a)(1) and 18 U.S.C. § 2) and possession with intent to distribute marijuana (21 U.S.C. § 841(a)(1) and (b) and 18 U.S.C. § 2). Motions to suppress and to sever were filed on behalf of all of the defendants. The court granted the motions in part, and thereafter, by written stipulation, agreed that if Counts I and II were dismissed, Count III might be tried to the court without a jury on the record made at the hearing on the various motions, together with a stipulation made in open court that the truck which was seized at the time of the arrest of Kevin Curtis had in it approximately 400 pounds of marijuana.

In September 1976 defendant Theodore Thomas Curtis (hereafter Ted Curtis) approached Riverside Air Service in Riverside, California, and inquired about renting an aircraft. Learning that, in order to rent a twin-engine Piper

Navajo, he would be required to fly it 10 hours with a check pilot, Curtis rented a Navajo N-54727 (hereafter the Navajo) and flew it for the required time. On October 4, 1976, Ted Curtis rented the plane. It was returned on October 15, 1976. In the interim it had been flown 36.7 hours. The rental rate was $150.00 per hour. When the plane was returned, Joseph Pagan, one of the owners of the air service, became suspicious of the use which had been made of the Navajo. His suspicions were based on several facts. He had been told by Ted Curtis that he (Curtis) wanted the Navajo to use on a trip East. While the invoice showed that the Navajo would be based in Las Vegas, the conversations remained in Pagan's mind. The gas receipts submitted by Ted Curtis indicated that the Navajo had been fueled at Las Vegas, Nevada, Phoenix, Arizona, and Needles, California. Needles was not a place at which a plane with the range of the Navajo would normally stop for refueling for flights between Las Vegas, Phoenix, and Riverside. It appeared to Pagan that at least one of the seats had been removed and improperly reinstalled; that there was marijuana debris in the aircraft; that the condition of the props indicated that it had been used on dirt or gravel air strips. No one of these facts was in itself conclusive of any illegal use of the Navajo, but they were enough to engender a suspicion in Mr. Pagan's mind. When Ted Curtis approached Riverside Air Service about a further rental of the Navajo, Pagan conveyed his suspicions to the customs officials, and the customs officials, with the approval of Pagan, placed in the aircraft a transponder using a discreet code. The transponder could be electronically triggered and would emit a signal which would enable a radar operator to track the Navajo carrying it.

On November 8, Ted Curtis again rented the Navajo, and at the request of Ted Curtis, three of the passenger seats were removed. On the evening of November 8, the Navajo was observed at the airfield at Litchfield, Arizona, and the defendants Ted Curtis and Cordova were seen securing it.

Subsequently the Navajo was tracked by radar. I find from all of the evidence that it was the only aircraft in the area during the relevant time period with a transponder which signaled the discreet code used by the law enforcement officials. I find that all of the transponder signals received in the area and at the time were signals from the Navajo.

The relevant geography is this: Phoenix lies about 120 miles due north of the Mexican border. Litchfield is a few miles west of Phoenix. Wenden, Arizona, is about 88 miles west by north of Phoenix and slightly more than 100 miles due north of the Mexican border. Buckeye is about 60 miles east by south of Wender. At a point approximately 18 miles south of Wender there is an abandoned military airstrip. Dateland, Arizona, lies between Wender and the Mexican border and is about 38 miles north of the Mexican border.

On November 9, at about 9:50 P.M., the Navajo was tracked from Phoenix traveling toward Gila Bend where the signal was lost. At 10:10 P.M., the Navajo was picked up traveling toward Phoenix.

On November 10, at 12:06 A.M., the Navajo was tracked from Phoenix to Dateland, where the signal was lost. The Navajo next appeared on radar at 3:40 A.M. traveling east from Buckeye. The Navajo landed at Litchfield at 4:00 A.M. At 9:23 P.M. on November 10, the Navajo was tracked from the Phoenix area to Dateland where the signal was lost at about 9:44 P.M. The signal then reappeared at about 12:48 A.M. on

November 11, and the Navajo was tracked flying in a northerly direction to a point about 30 miles south of Wenden where the signal again disappeared at about 12:59 A.M. In the meantime, customs air officers, who had been stationed near Gila Bend, were advised that the Navajo had been picked up at a point near Dateland and was flying in a northerly direction. The customs officers were vectored to the area in an aircraft equipped with a forward-looking infrared scanning device (FLIR). They were unable to detect any airborne aircraft, but, knowing of the abandoned strip near Wenden, flew to it. The strip was scanned by FLIR, and an aircraft with a Navajo silhouette was seen on the strip facing in an easterly direction. The aircraft was unlighted and quite soon a ground vehicle approached it and a short time later another ground vehicle approached. The aircraft remained on the ground for 6 to 10 minutes, and then the aircraft departed the strip without displaying any lights. The customs aircraft followed it a short distance and then returned to the strip to follow the ground vehicles. Interstate Highway 10 lies about a mile north of the strip, and the ground vehicles were picked up again first by FLIR and then by eyesight before they reached Interstate 10. Until they reached Interstate 10 they were driven without lights. The surveilling aircraft concentrated on the lead vehicle. It entered the west-bound lane and traveled about 2 miles in that direction; then it crossed the median, made a 180° turn and headed east on the interstate. Other customs officers who had been waiting in Wenden were alerted, and they traveled to Interstate 10. By blinking lights, they identified the vehicle in which they were riding to the surveilling aircraft and were then directed by the aircraft to a pickup truck with a camper, which they stopped. The camper was driven by Kevin Curtis, and on a search was found to contain

approximately 400 pounds of marijuana. Kevin Curtis was taken into custody. The second vehicle was not followed; and the driver of it escaped.

Customs officers waiting at the Litchfield airfield were advised that the pickup truck had been searched and found to contain marijuana. Shortly thereafter the Navajo landed. Ted Curtis was in the pilot seat, Cordova was in the copilot's seat, and Dulin was riding in one of the passenger seats. All three were arrested.

With respect to the defendants Ted Curtis and Cordova, the evidence shows that both defendants were aboard the Navajo when it landed at Litchfield. Before defendants can be convicted of possession, however, it is necessary to determine that the marijuana which was found in the pickup was taken from the Navajo. I find that the aircraft seen on the strip at 1:02 A.M. on November 11, 1976, was the Navajo which landed in Litchfield a short time later. It was the only plane in the area carrying a transponder which responded to a discreet code. It was tracked to a point about 12 miles from the abandoned strip, traveling in the direction of the airstrip. The identification of the aircraft on the runway as a Navajo was wholly adequate. The Navajo was picked up again at a distance of 5 to 10 miles from the abandoned strip and was tracked to Litchfield. The radar tracking is entirely consistent with a landing at the abandoned strip. There is some discrepancy in the time of the reporting of the radar sighting of the Navajo as it approached Litchfield, but the discrepancy could be explained on the basis of a delay in reporting, and in any event is not sufficient to create any doubt about the identity of the Navajo.

Between October 4 and October 15 the Navajo was flown extensively over the desert near the Mexican border. On its return to Riverside on the 15th there was

evidence of a seat removal and of debris which may or may not have been marijuana. The props indicated landings on gravel and dirt strips.

Seats were removed by order of Ted Curtis before the rental on November 8th. Extensive flying of a high-cost (rental-wise) aircraft over deserted desert areas along the border is in itself a suspicious circumstance. The flight patterns on the 10th and 11th were entirely consistent with the pattern that would be developed by a plane flying to Mexico, loading marijuana and landing on a deserted airstrip in the desert north of the Mexican border. The facts that the flights were made at night and, at least on the 11th, were made without lights, were likewise consistent with smuggling. The vehicular activity on the airstrip and the duration of it are consistent with an unloading of the aircraft. The driving of unlighted vehicles to Interstate 10 indicates an effort at concealment. Marijuana was found in the one vehicle seized. How did it get there? If it wasn't in the vehicle before the Navajo landed, then it follows that it came from the Navajo. If it was in the vehicle before the Navajo landed, why did the vehicle make the strange nighttime rendezvous with a suspicious, unlighted airplane at an abandoned strip in the desert? The inference is inescapable that there was marijuana aboard the Navajo which was loaded and found in the pickup truck.

From the quantity of the marijuana found in the truck and from the fact that the marijuana was transferred from the Navajo to the pickup truck, I infer that the marijuana possessed by the defendants Ted Curtis and Cordova was possessed with the intent to distribute. I infer the requisite criminal intent from all of the circumstances of the case, including the surreptitious character of the events occurring at or near the landing strip.

As to the defendant Kevin Curtis I find:

On the early morning of November 11, 1976, Kevin Curtis drove a pickup truck from the landing strip described in the findings as to Ted Curtis and Dale Cordova to a point on Interstate Highway No. 10 where he was stopped, and the truck he was driving was found to contain approximately 400 pounds of marijuana. From the surreptitious character of the events occurring at the airstrip, the driving without lights, the erratic course of the truck on the highway, I infer that Kevin Curtis knowingly possessed the marijuana with a specific intent to disobey the law. From the quantity of marijuana involved I infer that the possession was with the intent to distribute.

As to the defendant John Dulin:

I ~~found~~ find all of the facts found as to the defendants Ted Curtis and Cordova. I have previously determined that the defendant Dulin was advised of his Miranda rights on two separate occasions, that he did not request an attorney, and that his confession was voluntarily made. As the trier of fact, I find that the confession was voluntarily made.

CONCLUSION

I find all of the facts found as to the defendants Ted that the defendants Ted Curtis, Dale Cordova, Kevin Curtis, and John Dulin are guilty of the crime charged in Count III of the indictment.

Counts I and II of the Indictment are dismissed as to all defendants with prejudice.

DATED this 4th day of March 1977.

/s/ Russell E. Smith

Russell E. Smith
United States District Judge